

No. 33193-8

**FILED**

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

AUG 30, 2015  
Court of Appeals  
Division III  
State of Washington

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In re the Matter of:

JAMES D. CUDMORE, Alleged Vulnerable Adult,

JOHN C. BOLLIGER, Appellant

and

TIM LAMBERSON, Respondent.

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**APPELLANT'S BRIEF**

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The appellant is attorney Mr. Bolliger. The alleged vulnerable adult was Mr. Cudmore. The person who dishonestly prosecuted this frivolous vulnerable adult protection order (“VAPO”) case against Gregg Belt (who himself was a witness in the related Guardianship case as to Mr. Cudmore’s **mental competence**) was Mr. Cudmore’s and Mr. Bolliger’s opposing counsel in the related Guardianship case (“Mr. Meehan”).

### I. ASSIGNMENTS OF ERROR

*First*, in disqualifying Mr. Bolliger from representing Gregg Belt any further on appeal on RPC 1.7 and RPC 1.9 grounds, the trial court erroneously declined to dismiss Mr. Meehan’s disqualification motion on grounds of waiver owing to Mr. Meehan’s extreme delay in filing his motion. In its disqualification order, the court failed to make any findings/conclusions with respect to the issue of waiver based upon delay. *Second*, the express wording of RPC 1.7 and RPC 1.9, combined with the unique facts of this case, demonstrate that Mr. Bolliger would not be violating either rule if the trial court had allowed Mr. Bolliger to represent Gregg Belt further on appeal. *Third*, the court erroneously failed to apply the dispositive legal doctrine of substituted judgment, thereby causing the court erroneously to disqualify Mr. Bolliger from representing Gregg Belt any further on appeal on the court’s implied grounds of RPC 1.7 and RPC 1.9 (because, in the court’s erroneous view, once Mr. Cudmore became a guardianship ward, a conflict of interest instantly and automatically sprung up between Mr. Cudmore and Gregg Belt). In its disqualification order, the court failed to make any findings/conclusions with respect to the dispositive legal doctrine of substituted judgment, either.

## II. STATEMENT OF THE CASE

1. For years before, **and at all times material hereto**, Mr. Cudmore lived at a deluxe residential care facility (“The Manor”), in his own apartment. The Manor provided his every daily need, e.g., it provided his meals in its dining facility – and care givers who regularly checked on him and timely gave him medications prescribed by his doctor. It has a barbershop, an exercise room, and activities and entertainment. **Mr. Cudmore was free to, and did, depart The Manor any time it pleased him.** For example, he sometimes would take Dial-A-Ride to his doctor’s office across town. Also, he sometimes would take The Manor’s bus to Fred Meyer to shop for snacks, drinks, laundry soap, etc. On 9/6/13, he took The Manor’s bus to the Mall and “walked the entire mall.” (At other times, he would catch a ride from a friend.) He cut his own fingernails and toenails, shaved himself, bathed himself, dressed himself, and used the bathroom by himself. He did his own laundry in the laundry machines down the hall from his room. He did his own shopping and bought his own clothes. Nearly every day, he’d use the exercise machines in The Manor’s exercise room – to keep his arms, shoulders, and legs toned; his regular, 1-hour routine was to use 10 workout stations, including an exercise bike. [CP 35-36 and 66]

2. In 2013, Gregg Belt was 49 years old. He historically had performed transportation, errands, grocery shopping, and yard work, etc. for elderly people. In addition, he previously worked with/for the elderly as a care giver and hospice assistant through Aging and Long-Term Care. Although Gregg Belt has a partial disability, his work with/for the elderly became his niche in

life. [CP 137-38]

3. Between **July 2, 2013** and **July 8, 2013**, Gregg Belt assisted Mr. Cudmore with his transportation needs between his residence at The Manor and his attorney's, Mr. Bolliger's, office. **That's it.**<sup>1</sup> [CP 138]

4. Mr. Cudmore's purpose in meeting with Mr. Bolliger on those first three occasions was to consult with Mr. Bolliger about having him prepare new estate-planning documents, and a new Will, for him. On **July 4, 2013**, Mr. Cudmore hired Mr. Bolliger expressly for that purpose, **with a written fee agreement**. In particular, with his new Will, Mr. Cudmore wanted to disinherit his stepson, Mr. Lamberson. [CP 138]

5. After Mr. Cudmore's initial visit with Mr. Bolliger on **July 2, 2013**, Mr. Lamberson found out about Mr. Cudmore's intended estate-planning changes directly from Mr. Cudmore, which is the **only reason** Mr. Lamberson and Mr. Meehan initiated their Guardianship case against Mr. Cudmore 10 days later. In other words, **Mr. Lamberson and Mr. Meehan initiated their Guardianship case only to try to prevent Mr. Cudmore from disinheriting Mr. Lamberson.** [CP 138]

6. On **July 8, 2013**, Mr. Cudmore and Mr. Bolliger reviewed the following estate planning documents which Mr. Bolliger had prepared for Mr.

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<sup>1</sup> In particular, on **July 2<sup>nd</sup>**, Gregg Belt's mom, Dona Belt, provided Mr. Cudmore's transportation, although Gregg Belt rode with her when she delivered Mr. Cudmore back home. On **July 4<sup>th</sup>**, Gregg Belt provided Mr. Cudmore's transportation both ways. On **July 6<sup>th</sup>**, Gregg Belt went to Mr. Cudmore's residence, solely to inform him that his next appointment with Mr. Bolliger was on **July 8<sup>th</sup>**; Gregg Belt delivered that message personally, because Mr. Cudmore's cell phone had been disconnected by his stepson, Mr. Lamberson (Mr. Meehan's client). On **July 8<sup>th</sup>**, Gregg Belt drove Mr. Cudmore only to Mr. Bolliger's office, but not back home. **That comprises the entirety of Gregg Belt's involvement in Mr. Cudmore's life:** prior to **July 2, 2013**, Gregg Belt had never met or conversed with Mr. Cudmore – and, after **July 8, 2013**, Gregg Belt never met or conversed with Mr. Cudmore again.

Cudmore according to his instructions – and Mr. Cudmore signed the same:

- a. a *General Durable Power of Attorney for Financial Decision Making*,
- b. a *General Durable Power of Attorney for Health Care Decision Making*, and
- c. a *Health Care Directive* [CP 45]

– with his new Will reviewed and signed by Mr. Cudmore later in the month.

[CP 57]

7. On **July 11, 2013**, Mr. Lamberson filed his VAPO petition against Gregg Belt. In his VAPO petition, Mr. Lamberson set forth **only** the following handwritten allegations mentioning Gregg Belt. [CP 290-96] In the section which reads (with original emphasis) “Describe the most recent incidents or threats of abandonment, sexual abuse, mental abuse, physical abuse, exploitation, neglect, and/or financial exploitation (**describe specific incidents or threats and the approximate dates**):,” Mr. Lamberson handwrote as follows (see p. 5 of 6):

On July 2<sup>nd</sup>, 2013, I received a call from my father’s financial advisor that said my dad was with Greg’s mother (Donna Belt, case # 13-2-01677-7) at another Edward Jones office. Those concerns have been filed in a separate VAPO (noted above). When I later met with my father at his apartment, Gregg was there with Donna and James Cudmore. He stated that he was just the driver and was helping his mom with my dad. On July 8<sup>th</sup>, Gregg again showed up at my dad’s apartment to drive him to another appointment. His demeanor with the attendant at the front desk caused her concerns for my father’s well being. See attached KPD incident report and notes from Abbie Elliot (front desk at The Manor). I believe that Gregg will continue to act on behalf of his mother and father (Donna & Larry Belt, respondents in VAPO noted above).

In the section which reads (with original emphasis) “Describe past incidents of abandonment, sexual abuse, mental abuse, physical abuse, exploitation, neglect, and/or financial exploitation (**describe specific incidents or threats**

**and the approximate dates):**,” Mr. Lamberson handwritten as follows (see p. 5 of 6):

None.

In the section which reads “Does the respondent use firearms, weapons or objects to threaten or harm the vulnerable adult? Please describe;,” Mr. Lamberson handwritten as follows (see p. 6 of 6):

N/A.

In the section which reads (with original emphasis) “**Efforts to give notice:** Did you make efforts to give notice of your request for temporary relief to the respondent? If so, describe how and when notice was given. If no notice was given, explain why not;,” Mr. Lamberson handwritten as follows (see p. 6 of 6):

On July 3<sup>rd</sup>, 2013, the respondent’s parents (Larry and Donna Belt) were informed that I would take legal action to prevent their interference with my father. I did not attempt to locate or inform Gregg.

8. Attached to Mr. Lamberson’s VAPO petition was a typewritten page which purports to be notes from “Abbie Elliott, Bookkeeper, The Manor at Canyon Lakes” (**which is not signed by her and is not declared by her under penalty of perjury** – the latter of which concerns Mr. Bolliger objected about at the 7/19/13 VAPO hearing<sup>2</sup>), which reads in pertinent part as follows about Gregg Belt’s trip to pick up Mr. Cudmore on 7/8/13:

12:50pm, Greg Belt comes to the front desk asking for Jim Cudmore. He asked if he was in. I told him that I would be happy to call Jim. Asked him who he was . . . . He stated his name was Greg and he was going to take Jim to an appt. I phone Jim and told him he had a visitor. Jim stated

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<sup>2</sup> July 19, 2013 RP, p. 6.

that he was in the restroom and he would call me back later. I told Greg that Jim was not available at the moment and that he would call me back. He walked out the door and I then saw him knocking on Jim's outside window. I went out and asked him what he was doing. He said he was taking him to an appt. I reminded him that I had already called Jim and he was not available at the moment. He asked me if I had a problem with that, and if I did I should call the police.

I then came inside and called son, Tim Lamberson.

I then called the police and reported my concerns.

Police arrived at the same time I saw James walking across the lawn to get into Greg's truck.

Greg approached the officer, and I took James back to his patio. James stated that I worried too much and that I should not worry about him. I explained to him that I am just concerned. I asked him where he was going, and he told me that he could not tell me.

Greg informed the officer that he was just the DRIVER, that he was the driver to take him to attorney Bollinger 509-619-7674. Officer Rees confirmed the appt at Bollinger, and we had no choice but to allow Greg to take Jim to his appt.

When I asked Greg if he was meeting his mother at the attorneys office, he stated he was just the driver. Jim confirmed that he was meeting with the attorney with Donna Belt.

Abbie Elliot, Bookkeeper  
The Manor at Canyon Lakes [CP 297]

9. Also attached to Mr. Lamberson's VAPO petition was a police report regarding the 7/8/13 visit just described, in which KPD Officer Rees set forth his personal observations as follows [CP 298]:

Contacted elderly male and Greg Belt. Belt advised he was taking male to his attorney where he has a scheduled meeting. RHR  
I telephoned attorney, John Bolliger, who confirmed this meeting stating Gregg is merely the elderly male's transportation. I talked with RP about this who advised there is something odd about recent activity and is keeping elderly male's family in loop. K74 RHR

10. The foregoing handwritten comments of Mr. Lamberson, Ms.

Elliot's typewritten notes, and Officer Rees' report comprise the substantive allegations against Greg Belt contained in Mr. Lamberson's VAPO petition.<sup>3</sup>

11. On **July 17, 2013**, Mr. Bolliger communicated with Mr. Cudmore and Gregg Belt, who both asserted to Mr. Bolliger that they wanted him to oppose Mr. Meehan's VAPO case against Gregg Belt. On **July 18, 2013**, Mr. Bolliger therefore filed his *Notice of Appearance* on behalf of both Mr. Cudmore and Gregg Belt for Mr. Meehan's frivolous VAPO case against Gregg Belt. [CP 299-301]

12. On **July 18, 2013**, via a **second written fee agreement**, Mr. Cudmore hired Mr. Bolliger to defend Mr. Cudmore against the Guardianship action. Throughout Mr. Bolliger's representation of Mr. Cudmore in the Guardianship case, Mr. Cudmore repeatedly (and always) expressed to Mr. Bolliger and others his unequivocal opposition to Mr. Lamberson having a guardianship over him. [CP 139]

13. Also on **July 18, 2013**, Mr. Bolliger took Mr. Cudmore to his Dr. Vaughn. That same day, Mr. Bolliger filed Mr. Cudmore's *Declaration of James Daniel Vaughn, M.D.* In that declaration, Dr. Vaughn, who had been Mr. Cudmore's primary care physician since 1999 (and who was successfully treating him for Alzheimer's), set forth his medical opinion that Mr. Cudmore was **mentally competent** to direct that new estate-planning documents be prepared for him, as follows: [CP 139-41]

2. I have been Mr. Cudmore's primary care physician since

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<sup>3</sup> The Court presumably will conclude that it is one of the very weakest underlying petitions for which it has been called upon to uphold a VAPO.

approximately 1999.

3. I previously met with Mr. Cudmore, regarding a sinus infection for which I was treating him, on 7/1/13. The next time I met with Mr. Cudmore was on **July 18, 2013**, when his attorney, Mr. Bolliger, brought Mr. Cudmore in for his appointment to follow up on that subject.

4. During that latter appointment, Mr. Bolliger and Mr. Cudmore explained that, on July 8, 2013, Mr. Cudmore reviewed and signed some new estate planning documents for himself in Mr. Bolliger's office. They asked me to provide a written medical opinion which addresses Mr. Cudmore's mental capacity to understand and sign those new estate planning documents on July 8<sup>th</sup>. In particular, Mr. Bolliger asked me to assess Mr. Cudmore's mental capacity during the period between the two dates set forth in the preceding paragraph. Further, Mr. Bolliger provided me the legal standard, set forth by the Supreme Court of Washington, in In re Bottger's Estate, 14 Wn.2d 676, 685, 129 P.2d 518 (1942), which my medical opinion is to address, which he represented is as follows from that Supreme Court case (with emphasis added in bold):

The rules as to what constitutes testamentary capacity have been stated, and the earlier cases collected, in a number of our recent decisions: In re Larsen's Estate, 191 Wn. 257, 71 P.2d 47; Dean v. Jordan, 194 Wn. 661, 70 P.2d 331; In re Schafer's Estate, 8 Wn.2d 517, 113 P.2d 41; In re Miller's Estate, 10 Wn.2d 258, 116 P.2d 526.

**Those cases hold that a person is possessed of testamentary capacity if at the time he assumes to execute a will he has sufficient mind and memory to understand the transaction in which he is then engaged, to comprehend generally the nature and extent of the property which constitutes his estate and of which he is contemplating disposition, and to recollect the objects of his bounty.**

When Mr. Cudmore's stepson, Tim Lamberson, asked me on July 8, 2012 to opine generally about Mr. Cudmore's mental capacity, Mr. Lamberson did not ask me to address the aforementioned Supreme Court legal standard.

5. In rendering my renewed medical opinion, I base it upon my two visits with Mr. Cudmore on the dates set forth in ¶ 3 above, my historical knowledge about Mr. Cudmore as his primary care physician, my review of the facts Mr. Bolliger set forth in his July 15, 2013 *Declaration of John C. Bolliger* (which Mr. Bolliger told me he is filing in this case), and the aforementioned Supreme Court legal standard. Based upon those observations of mine, I now renew my written medical opinion to specifically address the Supreme Court legal issue mentioned above: Mr.

Cudmore's mental capacity to understand and sign his new estate planning documents on July 8, 2013. I have attached that written medical opinion hereto as **Exhibit A**.

6. I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

**EXHIBIT A:**

I met today with Mr. Cudmore and his attorney, and we discussed his mental capacity to understand and sign his estate planning documents.

As I understand it, these were performed on July 8, 2013.

Although this patient suffers from a treated dementia illness, I believe that his ability to converse and understand his estate planning issues on July 8, 2013 were adequate and not impaired.

I agree that he is able to comprehend generally the nature and extent of his estate plan and make decisions about it. I gather this opinion from talking with him. He is able to understand the extent of his assets, and who his natural heirs are.

14. Thus, at this point, Mr. Meehan already knew that (1) Mr. Cudmore already had been deemed **mentally competent** by his personal physician since 1999, (2) Mr. Bolliger already had been preparing new estate planning documents for Mr. Cudmore at Mr. Cudmore's direction, (3) Mr. Bolliger already was defending Mr. Cudmore against Mr. Meehan's Guardianship case against Mr. Cudmore, and (4) Gregg Belt already was a witness on behalf of Mr. Cudmore with respect to Mr. Cudmore's **mental competence** in the Guardianship case. So, in a deceptive design to try to prevent such testimony in the Guardianship case from Gregg Belt, Mr. Meehan made the decision to prosecute the frivolous VAPO petition against Gregg Belt.<sup>4</sup>

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<sup>4</sup> After his 7/2/13 initial consultation with Mr. Bolliger, Mr. Cudmore asked his 35-years-long friend, Dona Belt (who is Gregg Belt's mother), to take him to his bank (HAPO) and his investment firm ("Edward Jones"), so he could find out the specific details of his savings and investments. After his visit with Edward Jones, someone at

15. At Mr. Meehan's July 19, 2013 VAPO hearing against Gregg Belt, Mr. Meehan and the judge never raised any issue about disqualifying Mr. Bolliger on grounds of his joint representation of Mr. Cudmore and Gregg

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Edward Jones purportedly called Mr. Lamberson and told him that Dona Belt had taken Mr. Cudmore to Edward Jones for the purpose of having him change his beneficiary designation to her. (The word "purportedly" is used in the preceding sentence because, although he repeatedly continued to refer to that allegation in court proceedings thereafter, Mr. Meehan never provided any admissible evidence that the Edward Jones accusation ever was actually made.) [CP 37]

As it turns out, Mr. Meehan later admitted that the purported Edward Jones allegation is "a lie." In Mr. Meehan's 10/16/13 deposition of Dona Belt, the following exchange took place regarding the 7/2/13 ride Dona Belt gave Mr. Cudmore to Edward Jones' office (with emphases added):

MR MEEHAN: Okay. Are you aware that Tim Lamberson had received a phone call from Edward Jones and that **rightfully or wrongfully** they were suggesting that you were having Mr. Cudmore change his beneficiary designation to your name?

DONA BELT: That is a lie. That is a big lie.

MR MEEHAN: Okay, okay, okay. **I understand that**, but what I'm asking you is were you aware, even though I **accept that that's a lie**, and I will tell you **Edward Jones has told me that their initial reaction was wrong**. So I understand that it's not true. I get that. . . . .

See Dona Belt dep. transcript, p. 29 [CP 37 and 113].

On 7/19/13, the initial guardianship hearing took place **prior to the VAPO hearing against Gregg Belt** – on the same morning, in the same courtroom, with the same two attorneys presenting argument (i.e., Mr. Bolliger and Mr. Meehan), and **with the same judge**. At the guardianship hearing, **without providing any admissible evidence therefor**, Mr. Meehan dishonestly represented to the court as follows about Mr. Cudmore's 7/2/13 visit with Edward Jones (with emphases added):

MR. MEEHAN: . . . . A few weeks ago as shown by the declarations Your Honor, Edward Jones called and said we've got some real concerns because **this person that we don't recognize has Mr. Cudmore here at our office changing his beneficiary designations on his accounts**.

. . . .

MR. MEEHAN: . . . Greg Belt and Donna and Larry Belt and you're going to have VAPO hearing on that on your 9:30 docket. And they were taking Mr. Cudmore out to make **all of these different financial arrangements and adjustments**.

Again, those accusations were **absolutely false** and they were **unsupported by any admissible evidence**. [CP 46]

On 7/19/13, Mr. Meehan's initial VAPO hearing against Gregg Belt's parents (Dona and Larry Belt) next took place – in the same courtroom, with the same two attorneys presenting argument (i.e., Mr. Bolliger and Mr. Meehan), and **with the same judge**. Mr. Lamberson and Mr. Meehan volunteered in open court to dismiss Mr. Lamberson's VAPO case against Dona and Larry Belt (case no. 13-2-01677-7). The **only reason** Mr. Lamberson and Mr. Meehan volunteered to dismiss their VAPO case against Gregg Belt's parents, Dona and Larry Belt, at the 7/19/13 hearing is because **Mr. Lamberson and Mr. Meehan already knew by then that there was no attempted financial exploitation of Mr. Cudmore by Dona Belt at Edward Jones on 7/2/13**. There is no other explanation for their dismissal. So, there was no earthly reason for Mr. Lamberson and Mr. Meehan to proceed with their VAPO case against Gregg Belt, either – but they did so immediately next. [CP 47 and 136]

Belt. Unsatisfied with the actual facts of the VAPO petition, Mr. Meehan made the decision to puff them up in his oral argument. Mr. Meehan **falsely asserted** that Gregg Belt was “rude and aggressive” during the **July 8, 2013** occasion Gregg Belt arrived to pick up Mr. Cudmore [July 19, 2013 RP, p. 2, line 24] – and that Gregg Belt had then been “banging” on Mr. Cudmore’s door. [July 19, 2013 RP, p. 3, line 1] Mr. Bolliger explained that **Mr. Meehan was making up facts**, because neither Mr. Lamberson’s handwritten averments, nor Ms. Elliott’s notes, nor Officer Rees’ report use either of the words “rude” or “aggressive” in describing Gregg Belt, Ms. Elliot’s notes said that Gregg Belt had merely been “knocking” on Mr. Cudmore’s window in order to get his attention (because 85-year-old Mr. Cudmore was hard of hearing), and Ms. Elliot’s notes reveal that the police actually were summoned at the suggestion of Gregg Belt. Mr. Bolliger further explained that Mr. Lamberson has alleged **no concrete wrongdoing** on Gregg Belt’s part which would justify a VAPO against him. Mr. Bolliger further explained that Gregg Belt has several elderly clients he works for – doing yard work, grocery shopping, and such for them – and a continued VAPO against Gregg Belt could be detrimental for his employment. [July 19, 2013 RP, pp. 6-9] At the end of the hearing, the judge entered a VAPO against Gregg Belt for a period of one (1) year – with boiler plate (pre-printed-on-the-form) findings that Gregg Belt had “committed acts of abandonment, abuse, neglect, and/or financial exploitation” of Mr. Cudmore, [CP 302-04] even though there was **no evidence** to support any of those

boiler plate findings.<sup>5</sup>

16. On **July 21, 2013**, Mr. Bolliger met with Mr. Cudmore and Gregg Belt to discuss what had happened at the VAPO hearing. Mr. Cudmore requested the opportunity to have another hearing, at which he could be in attendance, so he could speak directly with the judge to explain that he does not want or need any “protection” from Gregg Belt. [CP 141]

17. On **July 26, 2013**, Mr. Bolliger filed Mr. Cudmore’s *Declaration of James D. Cudmore*, in which Mr. Cudmore declared as follows (with emphasis added): [CP 142]

1. I am the above-named alleged vulnerable adult, I have personal knowledge of the facts set forth below, and, if called to testify about the same, I can and will competently do so.

2. As I understand it, at the hearing last week, the Court entered a 1-year order of protection to protect me against Gregg Belt. The only involvement Gregg Belt has had in my life is that, earlier this month, he gave me a ride to my attorney’s, Mr. Bolliger’s office on two occasions. **I like Gregg Belt. He is the son of my good friend, Dona Belt. I have known Dona for about 35 years. I don’t want or need an order of protection against Gregg Belt. I ask the Court to get rid of it.**

3. I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.<sup>6</sup>

Also on **July 26, 2013**, Mr. Bolliger filed Mr. Cudmore’s and Gregg Belt’s *Motion for Reconsideration* of the 1-year VAPO the court had entered against Gregg Belt [CP 142] – in response to which the court reserved until some indeterminate later date. [CP 382-84]

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<sup>5</sup> Respectfully, the judge who presided over Mr. Meehan’s VAPO hearing against Gregg Belt had been a judge for only about 2½ months. In his prior law practice, primarily as an adult and juvenile criminal defense attorney, he did not seem to have gained experience with guardianship cases, VAPO cases, or estate planning issues.

<sup>6</sup> Mr. Cudmore never deviated from his opposition to a VAPO being entered against Gregg Belt.

18. On **August 12, 2013**, Mr. Bolliger wrote Mr. Meehan an email, in which he stated as follows: [CP 50-51 and 98]

Now that Judge Mendoza has answered my *Motion for Reconsideration* in the above-referenced case, do you still want to settle the case pursuant to our conversation on Friday, or do you just want the case to play out along the lines of Judge Mendoza's written ruling? Please advise. Thank you.

19. On **August 13, 2013**, Mr. Meehan responded with an email to Mr. Bolliger, in which he stated as follows (with emphasis added): [CP 51 and 99]

**We'd like to proceed with the stipulation along the terms of what we discussed the other day. Please send me a draft.**

That same day, Mr. Bolliger replied with an email to Mr. Meehan, in which he stated as follows: [CP 51 and 100-03]

Your copy of the proposed *Stipulation and Order Vacating Vulnerable Adult Protection Order* appears in the attached .pdf file. Assuming it meets with your satisfaction, please sign it where indicated and return it to me. Then, Gregg Belt and I will sign it – and I'll get it entered with the court. Thereafter, I'll provide you a fully signed (and conformed) copy. Thank you.

20. On **August 20, 2013**, after not hearing back from Mr. Meehan, Mr. Bolliger wrote another email to Mr. Meehan, in which he stated as follows: [CP 51 and 104-107]

The draft *Stipulation and Order Vacating Vulnerable Adult Protection Order* appears in the attached .pdf file. Gregg Belt and I both now have signed it. If you will please sign, as well, and email the signature page back to me, I'll do the GR-17 thing and get the order entered – and then provide you a conformed copy of the same. Thank you for your professional courtesies.

That same day, Mr. Meehan responded with an email to Mr. Bolliger, in which he stated as follows (with emphasis added): [CP 51-52 and 108]

I am working this through with my client. I will let you know when or if he is ready to sign. **It looks as if he may just let things play out at this point.**

21. On **December 27, 2013**, Mr. Cudmore was adjudicated to be incapacitated in the Guardianship case. Therefore, on **January 27, 2014**, Mr. Bolliger filed his *Notice of Intent to Withdraw* from representing Mr. Cudmore any further in the Gregg Belt VAPO case. [CP 142]

22. On **February 20, 2014**, the judge issued his single-word *Order on Motion for Reconsideration* regarding the VAPO the judge had entered against Gregg Belt on **July 19, 2013**: “Denied.” [CP 142]

23. On **March 13, 2014**, Mr. Bolliger filed Gregg Belt’s *Notice of Appeal* of the VAPO that the court had entered against Gregg Belt on **July 19, 2013**. [CP 142]

24. On **April 28, 2014**, Mr. Meehan filed a bar complaint with the WSBA, lodging entirely specious allegations against Mr. Bolliger in this case.<sup>7</sup> Mr. Meehan alleged in his bar complaint that Mr. Bolliger had violated RPC 1.7 and RPC 1.9 in his joint representation of Mr. Cudmore and Gregg Belt in Mr. Meehan’s VAPO case against Gregg Belt. Mr. Bolliger timely and substantively rebutted each and every allegation Mr. Meehan raised against him with that bar complaint.

25. On **July 19, 2014**, the 1-year VAPO against Gregg Belt expired by its own terms. [CP 302]

26. On **August 7, 2014**, Mr. Meehan **for the first time** filed his

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<sup>7</sup> A copy of Mr. Meehan’s bar complaint against Mr. Bolliger is attached in the Appendix hereto, pp. 1-6.

disqualification motion with the trial court – which he aimed only at disqualifying Mr. Bolliger from representing Gregg Belt any further on appeal. [CP 143]

27. On **August 21, 2014**, Mr. Bolliger filed with the trial court his declaration (in opposition to Mr. Meehan's disqualification motion), attaching thereto a copy of Gregg Belt's appellate-case *Second Amended Appellant's Brief*. [CP 28-136]

28. On **September 12, 2014**, Mr. Bolliger filed with the trial court Gregg Belt's *Amended Memorandum of Law in Opposition to Motion to Disqualify Attorney John C. Bolliger from Representing Gregg Belt on Appeal*. [CP 137-55]

29. On **December 5, 2014**, the trial court orally stated as follows (with emphases added):

MR. BOLLIGER: Is it the court's position that up until the time I withdrew from representing Mr. Cudmore that there was no conflict?

THE COURT: . . . . **But at this point I think that particularly with Mr. Lamberson being appointed as guardian that there is** and the court having found that there was a need for a protection order than **on this appeal** Mr. Belt's excuse me **Mr. Cudmore's interests are being represented through Mr. Lamberson that there is a conflict.**

To more specifically answer your question I guess I hadn't – I thought about whether or not that was in fact a conflict. I don't know under these circumstances I have sufficient factual basis to say there was a conflict or there was not a conflict.

MR. BOLLIGER: So the basis of your ruling is essen – I'm not trying to box your words in I'm just trying to clarify. Essentially since my withdrawal from representing Mr. Cudmore or maybe even **from the December 27<sup>th</sup>**

**entry of the guardianship against Mr. Cudmore from that point forward I'm representing a current client, Mr. Belt, against a former client, Mr. Cudmore. Is that fair to say?**

THE COURT: **Correct that is fair to say.**<sup>8</sup>

Thus, on **December 5, 2014**, it was the court's oral view that, once the court adjudicated Mr. Cudmore as incapacitated on **December 27, 2013**, a conflict of interest instantly and automatically sprung up between Mr. Cudmore and Gregg Belt – so that Mr. Bolliger no longer could represent Mr. Belt in his appeal of the **July 19, 2013** VAPO (which already had expired by its own terms back on **July 19, 2014**).

30. On **December 17, 2014**, Mr. Bolliger filed with the court Gregg Belt's *Supplemental Memorandum of Law . . . .* [CP 160-245] In that memorandum, Mr. Bolliger fully explained to the court how operation of the legal doctrine of substituted judgment renders the court's **December 5, 2014** orally communicated viewpoint erroneous – because the court is bound by Mr. Cudmore's pre-incapacitated decision making on the subject, rather than any contrary decision making in which Mr. Cudmore's guardian (Mr. Lamberson) might thereafter want to engage. Mr. Meehan declined to respond to Mr. Bolliger's substituted judgment briefing. [CP 262]

31. On **January 21, 2015**, the trial court entered its written order disqualifying Mr. Bolliger from representing Gregg Belt any further on appeal, impliedly on grounds of RPC 1.7 and RPC 1.9. [CP 251-54] That written order, here under appeal, curiously contains the following defects:

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<sup>8</sup> December 5, 2014 RP, p. 21.

1. its Finding of Facts 1, 4, 5, and 7 list only benign facts which, alone or taken together, do not express any wrongdoing on Mr. Bolliger's part,
2. with respect to its Finding of Fact #2 ("Bolliger did not inform Belt or Cudmore about the dangers of joint representation and did not receive a written conflict of interest waiver from either Belt or Cudmore"), **there is no evidence in the record to support that finding** – and, in any event, such a written waiver would not be needed in this case,
3. its remaining Findings and Conclusions merely state general propositions of law which are not tied to any Findings expressing any wrongdoing on Mr. Bolliger's part,
4. it makes no Findings or Conclusion whatsoever about Mr. Meehan's waiver of his motion to disqualify based upon his extreme delay in filing his motion, and,
5. most defective of all, it makes no Findings or Conclusions whatsoever about application of the legal doctrine of substituted judgment to this case, which doctrine **dispositively** demonstrates that it was error to disqualify Mr. Bolliger on grounds of RPC 1.7 and RPC 1.9.

32. On **January 30, 2015**, Mr. Bolliger filed Gregg Belt's *Motion for Reconsideration*. [CP 255-75]

33. On **February 2, 2015**, with respect to Mr. Meehan's bar complaint against Mr. Bolliger, the WSBA Office of Disciplinary Counsel ("ODC") wrote Mr. Bolliger and Mr. Meehan a letter,<sup>9</sup> in pertinent part saying as follows:

.... We believe the best course of action at this time is to defer the investigation of this matter because the allegations in Mr. Meehan's grievance are related to the pending civil litigation.

34. On **February 12, 2014**, Mr. Bolliger wrote Mr. Meehan a letter, in which he stated as follows [109-11]:

I write to inform you that, in the above-referenced case, I will be seeking CR 11 fees against you for your wrongful pursuit of the VAPO order of

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<sup>9</sup> A copy of the ODC's letter is attached in the Appendix hereto, pp. 7-8.

protection against Gregg Belt.

35. On **February 20, 2015**, the trial court issued its order denying Gregg Belt's *Motion for Reconsideration*. [CP 276-78]

36. On **March 6, 2015**, as the sole named appellant, Mr. Bolliger filed his *Supplemental Notice of Appeal* of the trial court's written order implying that Mr. Bolliger had violated RPC 1.7 and RPC 1.9. [CP 279-289] Because Mr. Bolliger is the sole named appellant for this appeal of the implied ethical-violation issues, this Court assigned a different appellate case number (no. 33193-8) to this appeal than the existing appellate case number (no. 32327-7) for Gregg Belt's appeal of the frivolous VAPO that Mr. Meehan wrongly obtained against Gregg Belt.

37. On **April 28, 2015**, Mr. Meehan **stipulated** that his frivolous VAPO against Gregg Belt should be **vacated** from its inception – and the vacation order was entered. [CP 351-64] That was an acknowledgment by Mr. Meehan that **the VAPO never should have been entered against Gregg Belt in the first place.**<sup>10</sup> Of course, by then, Mr. Meehan's frivolous VAPO against Gregg Belt already had served Mr. Meehan's dishonest purpose: it had successfully prevented Gregg Belt from being a witness as to Mr. Cudmore's **mental competence** in the Guardianship case.

38. With its **April 28, 2015** letter, the Court directed the parties to provide it briefing in this appeal, as follows (with emphases added):

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<sup>10</sup> See, e.g., 15 Wash.Prac., *Civil Procedure*, § 39:10: "If the motion [to vacate] is granted, however, the judgment is entirely destroyed, and the rights of the parties are left as though no such judgment had ever been entered."

In accordance with RAP 6.2(b), counsel should be prepared to argue both (1) **finality** and, (2) in the event the order is **not final**, whether discretionary review should be accepted. See RAP 2.3(b).

39. After the briefing and oral argument, on **June 15, 2015**, the Honorable Monica V. Wasson entered her *Commissioner's Ruling*, in which she held as follows (with emphasis added):

This Court has therefore determined that Mr. Bolliger is an aggrieved party who may appeal as a matter of right the order that disqualified him based upon the superior court's **implicit** finding that he had violated the rules of ethics.

### III. ARGUMENT

To be clear, with this appeal of the trial court's RPC 1.7 and RPC 1.9 rulings, Mr. Bolliger does not purport to be seeking any affirmative relief on behalf of Gregg Belt – and Mr. Bolliger is not seeking to overturn the trial court's disqualification order for purposes of being able to continue, again, to represent Gregg Belt in this case. Mr. Bolliger fully understands that Gregg Belt's case became fully concluded – once Mr. Meehan finally stipulated to have his frivolous VAPO against Gregg Belt vacated from its inception on April 28, 2015. Rather, with this appeal, Mr. Bolliger seeks only to have the court's implicit RPC 1.7 and RPC 1.9 rulings overturned, so that he will not be subjected to unmerited discipline with the ODC.

#### **A. In Disqualifying Mr. Bolliger From Representing Gregg Belt Any Further On Appeal On RPC 1.7 And RPC 1.9 Grounds, The Trial Court Erroneously Declined To Dismiss Mr. Meehan's Disqualification Motion On Grounds Of Waiver Owing To Mr. Meehan's Extreme Delay In Filing His Motion**

Mr. Bolliger fully briefed this issue to the trial court in his **September 12, 2014 Amended Memorandum of Law in Opposition to Motion to Disqualify**

*Attorney John C. Bolliger from Representing Gregg Belt on Appeal*, [specifically, CP 144-47] which Mr. Bolliger herein incorporates by this reference to it.<sup>11</sup>

Essentially, disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties, as well as punishing counsel; therefore, disqualification of counsel should be imposed only when absolutely necessary. A **several-months delay** in bringing a motion to disqualify opposing counsel constitutes a **waiver** on the part of the moving party and therefore is **grounds for denial** of the motion – even where the motion is brought during the initial trial court proceedings – and **even if the underlying basis for the motion itself is meritorious**. (In such cases, the appellate court will decline to reverse the denial of a disqualification motion.)

In this case, Mr. Bolliger filed his *Notice of Appearance* – on behalf of both Mr. Cudmore and Gregg Belt – on **July 18, 2013**. Mr. Meehan did not file his motion to disqualify Mr. Bolliger until **August 7, 2014** – i.e., **with a delay of over a year**. More importantly, as the facts set forth above demonstrate, Mr. Meehan’s motion to the trial court came (1) **after** the initial trial court proceedings in the Gregg Belt VAPO case already had concluded, (2) **after** Gregg Belt already had filed his *Notice of Appeal*, (3) **after** the 1-year VAPO against Gregg Belt already had expired by its own terms, and (4) **after** Mr. Meehan and Mr. Bolliger already had engaged in considerable

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<sup>11</sup> In that briefing, Mr. Bolliger brought to the court’s attention the following legal authorities: First Small Business Inv. Co. v. Intercapital Corp., 108 Wn.2d 324, 738 P.2d 263 (1987), Matter of Firestorm, 129 Wn.2d 130, 916 P.2d 411 (1996), and Eubanks v. Klickitat County, 181 Wn.App. 615, 326 P.3d 796 (2014), review denied, 181 Wn.2d 1012 (2014).

litigation activities before the Court of Appeals.<sup>12,13</sup>

Based upon the foregoing, Mr. Bolliger respectfully requests that this Court hold that Mr. Meehan's disqualification motion effectively was **waived** by him because of his **extreme delay** in filing it – and that the trial court therefore erred by failing to deny Mr. Meehan's motion to disqualify Mr. Bolliger from representing Gregg Belt any further on appeal.

**B. The Express Wording Of RPC 1.7 And RPC 1.9, Combined With The Unique Facts Of This Case, Demonstrate That Mr. Bolliger Would Not Be Violating Either Rule If The Trial Court Had Allowed Mr. Bolliger To Represent Gregg Belt Further On Appeal**

Mr. Bolliger fully briefed this issue to the trial court in his **September 12, 2014 Amended Memorandum of Law in Opposition to Motion to Disqualify Attorney John C. Bolliger from Representing Gregg Belt on Appeal**, [specifically, CP 147-51] as follows (pp. 21-24 hereto, original emphases):

**3. On The Merits, The Facts Of This Case Do Not Support A Disqualification Of Mr. Bolliger From Representing Gregg Belt Under RPC 1.7**

Under RPC 1.7(a), a lawyer might be prohibited from representing two clients in a matter, **yet only if** the joint representation presents a “concurrent conflict of interest” – and (with emphases added):

[a] concurrent conflict of interest exists if:

- (1) the representation of one client will be **directly adverse** to another client; or
- (2) there is a **significant risk** that the representation of one or more

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<sup>12</sup> Because, by the time Mr. Meehan got around to filing his disqualification motion with the trial court, the 1-year VAPO against Gregg Belt already had expired by its own terms – the court's (5-months-later) disqualification of Mr. Bolliger impliedly on RPC 1.7 and RPC 1.9 grounds was erroneous also because any affirmative relief that Gregg Belt might obtain on appeal obviously could not possibly be “adverse” to Mr. Cudmore.

<sup>13</sup> In its disqualification order, the trial court failed to make any findings or conclusions with respect to this issue of waiver based upon delay.

clients will be **materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Mr. Bolliger represented both Mr. Cudmore and Gregg Belt in their united opposition to Mr. Meehan's contrived VAPO case against Gregg Belt. The VAPO case was just described as "contrived" because that is exactly what it was. As the facts above make clear, Gregg Belt's total experience with Mr. Cudmore involved assisting him with his transportation needs in getting to or from his attorney's, Mr. Bolliger's, office a few times between **July 2, 2013** and **July 8, 2013**. Mr. Cudmore had those transportation needs because he doesn't drive anymore. Mr. Cudmore's purpose for visiting Mr. Bolliger during that time frame was to have him prepare new estate planning documents for Mr. Cudmore, including a new Will. In that regard, Mr. Bolliger appropriately obtained a declaration from Mr. Cudmore's personal physician since 1999 (who was successfully treating him for Alzheimer's), who opined that Mr. Cudmore was **mentally competent**, under the standards set forth by the Supreme Court of Washington in In re Bottger's Estate, *supra*, to make and communicate about his own estate planning decisions. . . . There was absolutely no evidence in the case, of any kind whatsoever, that supported Mr. Meehan's false allegation that Gregg Belt somehow had "committed acts of abandonment, abuse, neglect, and/or financial exploitation" of Mr. Cudmore (which is why Gregg Belt has appealed Judge Mendoza's entry of a 1-year VAPO against him). Indeed, Mr. Meehan pursued his VAPO case against Gregg Belt – not for any of the reasons just quoted, but only as a litigation strategy to keep Gregg Belt away from Mr. Cudmore – and thereby keep him from being a lay witness in the Guardianship case regarding Mr. Cudmore's **mental competence**.

More to the point of the disqualification issue, during the extremely brief intersection of their lives, Gregg Belt's sole role in interacting with Mr. Cudmore was to **help** him – and only with respect to Mr. Cudmore's transportation needs. Once the Gregg Belt VAPO case was served on them, Mr. Cudmore and Gregg Belt both expressed their unmitigated desire for Mr. Bolliger to represent them in opposing that VAPO action. Indeed, Mr. Cudmore declared in the case (with emphasis added):

**I don't want or need an order of protection against Gregg Belt. I ask the Court to get rid of it.**

....

Thus, from the very inception of the Gregg Belt VAPO case, within the meaning of RPC 1.7(a)(1), it was clear to Mr. Bolliger that there was nothing about the case which suggested that his "representation of one client will be **directly adverse** to another client." (Emphasis added.) Similarly, from the very inception of the case, within the meaning of RPC

1.7(a)(2), it was clear to Mr. Bolliger that there was **no risk** (let alone “a **significant risk**”) that his representation of one of his two clients would be **at all limited** (let alone “**materially limited**”) by his responsibilities to the other client.

Comment 4 to RPC 1.7(a) states in pertinent part as follows (with emphasis added):

If a conflict arises **after** representation has been undertaken, the lawyer ordinarily must withdraw from the representation . . . .

Mr. Bolliger is (and was) fully aware of that requirement. That said, as the above facts make clear, **at no time** in the Gregg Belt VAPO case did Mr. Cudmore and Gregg Belt have any adversity exist or arise between them. No such circumstance ever arose in the case. Mr. Cudmore and Gregg Belt were always straightly and wholeheartedly aligned with each other in their opposition to Mr. Meehan’s VAPO case against Gregg Belt.<sup>14</sup>

4. **On The Merits, The Facts Of This Case Do Not Support A Disqualification Of Mr. Bolliger From Representing Gregg Belt Under RPC 1.9, Either**

RPC 1.9(a) addresses conflicts of interest a lawyer might have with respect to a current client and a “former client”

. . . in the same or a substantially related matter in which that person’s interests are **materially adverse** to the interests of the former client[.]

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<sup>14</sup> The fine point of this issue arises from the aforementioned “contrivance” Mr. Meehan engaged in by pursuing a VAPO case against Gregg Belt. As Mr. Meehan purports, he pursued the VAPO to “protect” Mr. Cudmore from Gregg Belt – and, so, by general definition (says Mr. Meehan), a conflict of interest would be present with one attorney representing both Mr. Cudmore and Gregg Belt in the case. Of course, that would be true **only if** the attorney who was defending Gregg Belt against the VAPO case was the same attorney who (on Mr. Cudmore’s behalf) pursued the VAPO case against Gregg Belt. However, that condition is not here present. Here, **Mr. Bolliger** – who was defending Gregg Belt against the VAPO case – **did not (on Mr. Cudmore’s behalf) pursue the VAPO case against Gregg Belt.** Thus, Mr. Bolliger was not representing “both sides” of the Gregg Belt VAPO case. Stated another way, Mr. Bolliger was not representing either of Mr. Cudmore or Gregg Belt “against” the other. Mr. Meehan (representing Mr. Lamberson) pursued the VAPO case against Gregg Belt – and Mr. Bolliger (representing Mr. Cudmore and Gregg Belt) opposed the VAPO being sought by Mr. Meehan and Mr. Lamberson.

In sum, Mr. Cudmore and Gregg Belt never, at any time, had any conflicting or adverse interest between them in the Gregg Belt VAPO case – not in any sense of that phrase or by any stretch of the imagination.

(Emphasis added.) The only reason Mr. Meehan mentions RPC 1.9 in his disqualification motion is because – on **January 27, 2014** – Mr. Bolliger withdrew from representing Mr. Cudmore any further in the Gregg Belt VAPO case. Once that happened, Mr. Cudmore technically became a “former client” of Mr. Bolliger’s with respect to the Gregg Belt VAPO case. That minor development aside, the analysis of Mr. Meehan’s disqualification motion under RPC 1.9 is essentially identical to the analysis of his disqualification motion under RPC 1.7. For that reason, with respect to Mr. Meehan’s RPC 1.9 “issue,” as well, Gregg Belt and Mr. Bolliger stand on their RPC 1.7 briefing set forth in the preceding Section.

Mr. Bolliger further briefed this issue to the trial court in his **December 17, 2014 Supplemental Memorandum of Law, And Declaration, in Opposition to Motion to Disqualify Attorney John C. Bolliger from Representing Gregg Belt on Appeal**, [specifically, CP 174-78] as follows (pp. 24-28 hereto, with original emphases):

See, e.g., Personal Restraint of Maribel Gomez, 180 Wn.2d 337, 325 P.3d 142 (2014). In Gomez, in deciding whether a criminal defense attorney’s **joint representation** of two, current clients in separate cases would implicate RPC 1.7(a), the Supreme Court of Washington explained that there is a distinction between (1) a “possible,” “potential,” or “theoretical” conflict of interest and (2) an “actual” or “active” conflict of interest, as follows (with emphases added), id. at 348-50:

.... To show a violation of her right [to effective assistance of counsel], a defendant must show that (a) defense counsel “**actively** represented conflicting interests” and (b) the “**actual** conflict of interest adversely affected” his performance. Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 54 L.Ed.2d 333 (1980). **Possible or theoretical** conflicts of interest are “insufficient to impugn a criminal conviction.” Id. If the defendant makes both showings as to the alleged conflict of interest, then the court presumes prejudice and the defendant proves her claim. Id. at 349-50, 100 S.Ct. 1708. **Accordingly, we must first consider whether [attorney] Moser actively represented conflicting interests.** We conclude that he did not.

.... [W]e note that the RPCs provide that a concurrent conflict of interest exists if “the representation of one client will be **directly adverse** to another client” or “there is a **significant risk** that the representation of one . . . client[] will be **materially limited** by the

lawyer's responsibilities to another client." RPC 1.7(a)(1), (2).

Here, the record shows that **at most there was a theoretical** conflict of interest between [the two current clients,] Gomez and Arechiga. . . . From the time the State added the charge of homicide by abuse [of Gomez's and Arechiga's child, Rafael] (April 2006) through Gomez's criminal trial (March 2007), Gomez and Arechiga were **potentially** adverse because Gomez could have **theoretically** argued that Arechiga was responsible for some or all of the abuse of Rafael and thereby escape conviction for homicide by abuse.

Although Gomez and Arechiga were **potentially** adverse from April 2006 through March 2007, ample evidence shows they were **not actually** adverse because Gomez could not have reasonably argued that Arechiga abused Rafael. . . .

In sum, [looking back with hindsight,] the record contains **no evidence** suggesting that Arechiga abused Rafael and, at trial, Arechiga supported Gomez's defense. It follows that Gomez's allegation of a conflict of interest is merely **theoretical** . . . . Since Gomez has not shown that Moser **actively** represented conflicting interests, we do not proceed to determine whether his performance was adversely affected by conflicting interests.

Thus, a mere allegation of a "possible," "potential," or "theoretical" conflict of interest does not implicate RPC 1.7(a). Rather, there must have been an "actual" or "active" conflict of interest for RPC 1.7(a) to be implicated. Significantly, in Gomez, neither the appellant nor the Court so much as suggested that attorney Moser's **joint representation** of both Gomez and Arechiga required Moser to obtain from each of his clients an "informed consent, confirmed in writing" under RPC 1.7(b). That is because the Court held there was no violation of RPC 1.7(a) in the first place – i.e., there is no requirement for an RPC 1.7(b) "informed consent, confirmed in writing" where there exists no "actual" or "active" conflict of interest under RPC 1.7(a) in the first place.

See, also, Friends of North Spokane County Parks v. Spokane County, 184 Wn.App. 105, 336 P.3d 632 (Div 3 2014). In Friends, Friends sued Spokane County and Fred Meyer, seeking a declaratory judgment that the County could not approve construction of a road through Freddy Park, and to enjoin construction of the road. After the County and Fred Meyer both appeared through the Spokane County Prosecuting Attorney, Friends moved to disqualify the prosecutor from representing Fred Meyer, alleging a **joint representation** conflict of interest under RPC 1.7(a). Division III upheld the trial court's denial of Friends' disqualification motion, holding as follows (with emphases added in bold and original emphases in italics), *id.* at 646-47:

RPC 1.7(a) prohibits a lawyer from representing a client if the representation of that client “will be **directly adverse** to another client,” or if there is a **significant risk** that the representation of more than one client “will be **materially limited** by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” “A lawyer represents conflicting interests when, on behalf of one client, it is the lawyer’s duty to contend that which the lawyer’s duty to another client requires him or her to oppose.” Marriage of Wixom, \_\_\_ Wn.App. \_\_\_, 332 P.3d 1063, 1072, motion for discretionary review filed, No. 90895-8 (Wash. Oct. 15, 2014).

....

The fundamental error in Friends’ analysis of conflict of interest is that it proceeds from the position Friends believes the county *should be taking* with respect to the 2001 deed and restrictions; namely that the county holds the park property in trust, particularly for nearby county residents, and that Fred Meyer has no continuing interest that enables it to participate in an amendment. Friends then contrasts that position with the position that Fred Meyer is taking: that it has a continuing property interest enabling it to amend the park deed to permit construction of a road. To determine whether a conflict of interest exists, however, the trial court properly considered the position that the county *was in fact taking*, as determined by its duly-elected board of county commissioners. ....

As evidenced by the Board’s 2012 resolution and both parties’ execution of the November 2012 amendment, the **parties’ objectives in this litigation have been aligned**. .... **The trial court did not err in concluding that the county’s and Fred Meyer’s interests were not conflicting.**

Thus, when an attorney undertakes the **joint representation** of two clients whose interests in the case are **aligned**, there is no RPC 1.7(a) conflict of interest requiring disqualification of the attorney. Significantly, in Friends, too, neither the appellant nor the Court so much as suggested that the Prosecuting Attorney’s **joint representation** of both Spokane County and Fred Meyer required the Prosecuting Attorney to obtain from each of his clients an “informed consent, confirmed in writing” under RPC 1.7(b). That is because the Court held there was no violation of RPC 1.7(a) in the first place – i.e., there is no requirement for an RPC 1.7(b) “informed consent, confirmed in writing” where there exists no “actual” or “active” conflict of interest under RPC 1.7(a) in the first place (because the interests of the two clients are aligned).

The two cases just discussed apply to RPC 1.7. However, the same principles apply with respect to RPC 1.9. See, e.g., State v. Vicuna, 119

Wn.App. 26, 79 P.3d 1 (2003). In Vicuna, the Court held as follows (with emphases added), *id.* at 28-31:

We agree that the trial court's inquiry was insufficient to determine whether an **actual** conflict existed. . . .  
. . . .

A trial court has a duty to determine whether an **actual** conflict **exists** before it may grant a motion to withdraw and substitute counsel. In re Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). "The determination of whether a conflict exists precluding continued representation of a client is a question of law and is reviewed *de novo*." State v. Ramos, 83 Wn.App. 622, 629, 922 P.2d 193 (1996). Rule of Professional Conduct 1.9(a) states . . . .

See, also, Teja v. Saran, 68 Wn.App. 793, 846 P.2d 1375 (1993), in which the Court held as follows (with emphases added in bold and original emphasis in italics), *id.* at 798:

**Under the plain language of RPC 1.9**, . . . an attorney may not proceed if . . . the former client's interests are [**materially**] **adverse** and the matter is substantially related. In defining the scope of the . . . requirement, the comment to Rule 1.9 of the Model Rules of Professional Conduct states:

. . . . When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with **materially adverse** interests clearly is prohibited. .... The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as **a changing of sides** in the matter in question.<sup>15</sup>

Thus, the elements of RPC 1.7 and RPC 1.9 never have been met with respect to Mr. Bolliger's **joint representation** of Mr. Cudmore and Gregg Belt in this case. There never has been any **actual** or **active** conflict of interest between Mr. Cudmore and Gregg Belt (Gomez, supra and Vicuna, supra). Rather, Mr. Cudmore's and Gregg Belt's interest in this case always have been fully **aligned** (Friends, supra). Mr. Bolliger's representation of Gregg Belt in no way whatsoever amounts to a **changing of sides** against his former client, Mr. Cudmore. Moreover, in support of his disqualification motion, Mr. Meehan provided this court **no evidence to the contrary**. See, also, Comment 8 to RPC 1.7 (with

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<sup>15</sup> That same precisely worded sentence – "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a **changing of sides** in the matter in question" (emphasis added) – also appears in Comment 2 to RPC 1.9.

emphasis added): “The **mere possibility** of subsequent harm does not itself require disclosure and consent.” As such, there never has been any requirement in this case for Mr. Bolliger to obtain “informed consent, confirmed in writing” from Mr. Cudmore and Gregg Belt. [Fn. omitted]

Essentially, then, in promulgating RPC 1.7 and RPC 1.9, the Supreme Court did not draft into the rules a concept that “an attorney may never, under any circumstances, represent more than one client in the same or substantially related matter.” The Supreme Court also did not draft into the rules a concept that “an attorney may represent more than one client in the same or substantially related matter – yet, only if each affected client gives informed consent, confirmed in writing.”

Rather, the rules authorize an attorney to represent more than one client in the same or substantially related matter – and they **condition** the attorney’s need to obtain “informed consent, confirmed in writing” from the affected clients with the phrases “directly adverse,” “significant risk,” “materially limited,” and “materially adverse” with respect to an **actual** or **active** concurrent conflict of interest. Those quoted conditions have intended meaning: where they are not present, there exists no **actual** or **active** concurrent conflict of interest in a joint representation. Because **none** of those conditions ever presented itself in this case, Mr. Bolliger’s earlier joint representation of Mr. Cudmore and Gregg Belt both (1) would not be violative of either RPC 1.7 or RPC 1.9 if the trial court had allowed Mr. Bolliger to represent Gregg Belt further on appeal and (2) did not require either of Mr. Cudmore or Gregg Belt to “give[] informed consent, confirmed in writing.”

Based upon the foregoing, Mr. Bolliger respectfully requests that this

Court hold – given the express wording of RPC 1.7 and RPC 1.9 (and given the unique facts of this case) – that (1) Mr. Bolliger would not be violating either rule if the trial court had allowed Mr. Bolliger to represent Gregg Belt further on appeal and (2) the trial court therefore erred by failing to deny Mr. Meehan’s disqualification motion on the merits.

**C. The Court Erroneously Failed To Apply The Dispositive Legal Doctrine Of Substituted Judgment, Thereby Causing The Court Erroneously To Disqualify Mr. Bolliger From Representing Gregg Belt Any Further On Appeal On The Court’s Stated Grounds Of RPC 1.7 And RPC 1.9 (Because, In The Court’s Erroneous View, Once Mr. Cudmore Became A Guardianship Ward, A Conflict Of Interest Instantly And Automatically Sprung Up Between Mr. Cudmore And Gregg Belt)**

Mr. Bolliger fully briefed this issue to the trial court in his **December 17, 2014 Supplemental Memorandum of Law, And Declaration, in Opposition to Motion to Disqualify Attorney John C. Bolliger from Representing Gregg Belt on Appeal**, [specifically, CP 163-73] as follows (pp. 29-38 hereto, with original emphases):

**I. Under The Doctrine Of Substituted Judgment, The Court Cannot Disqualify Mr. Bolliger From Continuing To Represent Gregg Belt On Appeal – By Ruling That A Conflict Of Interest Now Exists Under RPC 1.7 And/Or RPC 1.9 (Merely Because Mr. Cudmore’s Guardian, Mr. Lamberson, Theoretically And Unilaterally Might Like To Assert That Such A Conflict Now Exists) – If Mr. Cudmore’s Competent Expression For This Case Actually Was That No VAPO Order Of Protection Should Be Entered To “Protect” Him From Gregg Belt**

The doctrine of substituted judgment (sometimes referred to as “substituted decision making”) is well grounded in guardianship law. For example, see the following authorities and references.

**A. The National Guardianship Association’s Recognition Of The Doctrine Of Substituted Judgment**

The National Guardianship Association’s (“NGA’s”) *Model Code of*

*Ethics for Guardians*<sup>16</sup> (on its p. 8, in the section titled “Substituted Judgment”) sets forth as follows (with emphases added in bold and underline):

The principal of **substituted judgment** requires the [guardian] to attempt to reach the decision the incompetent person would make if that person were able to choose. [Fn. omitted] Use of this model for decision making allows the guardian to make decisions in accord with the incompetent person’s own definition of well-being. It is critical to note that this model can only be used if the guardian, through available sources of information, is able to determine the prior preferences of the ward. [Fn. omitted] **The Model Code, based as it is on the belief that this type of decision making should be utilized if possible, imposes a duty on guardians to attempt to find this information.**

. . . . The ward’s own behavior and choices prior to the onset of the incapacity may provide some clues, if known or discoverable. The ward, even if unable to participate fully, may indicate certain preferences by verbal or nonverbal communications. **To the greatest extent possible, the guardian must exercise substituted decision making in light of all that he or she can learn about the ward’s prior feelings and preferences, and should decide based on how the ward would decide if able.** It is essential, though, to recognize that the guardian is the only one who makes the decision, and the guardian is the one who bears the ultimate responsibility for the decision made on behalf of the ward. Substituted judgments made after consideration of all available information about the ward are more likely to be decisions which the ward would make if able.

The situation is best understood by reference to [a case where] the ward was certainly competent prior to the progression of her Alzheimer’s Disease and provided much available information on her thought process. **Guardians should ethically defer to this in most situations.**

Similarly the NGA’s *Standards of Practice*<sup>17</sup> (on its p. 7, in the section titled “Substituted Judgment”) sets forth as follows (with emphases added in bold and underline):

- A. **Substituted Judgment is the principle of decision-making that substitutes the decision the person would have made when the**

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<sup>16</sup> A copy of which is attached hereto as Exhibit 1. [CP 184-201]

<sup>17</sup> A copy of which is attached hereto as Exhibit 2. [CP 202-35]

**person had capacity as the guiding force in any surrogate decision the guardian makes.**

- B. Substituted Judgment promotes the underlying values of self-determination and well-being of the person.
- C. Substituted Judgment is not used when following the person's wishes would cause substantial harm to the person or when the guardian cannot establish the person's goals and preferences even with support.

Further, the NGA lists the Washington [State] Association of Professional Guardians as one of its "State Affiliates."<sup>18</sup>

### **B. Washington State Decisional Law's Recognition Of The Doctrine Of Substituted Judgment**

Matter of Disciplinary Proceeding Against Petersen, 180 Wn.2d 768, 329 P.3d 853 (2014). In Petersen, the Supreme Court of Washington affirmed the Certified Professional Guardian Board's decision to discipline Ms. Petersen, a certified professional guardian, for her failure to implement substituted judgment with respect her guardianship of two adult wards. In so holding, the Court acknowledged and quoted the Board's *Standards of Practice* 405.1 (with emphases added in bold and underline), *id.* at 776, fn. 6, as follows:

**The primary standard for decision-making is the Substituted Judgment Standard based upon the guardian's determination of the incapacitated person's competent preferences, i.e., what the incapacitated person would have decided when he or she had capacity.** The guardian shall make reasonable efforts to ascertain the incapacitated person's historic preferences and shall give significant weight to such preferences. Competent preferences may be inferred from past statements or actions of the incapacitated person when the incapacitated person had capacity.

Thus, the fact that guardians must implement substituted judgment in making decisions for their wards remains a clear matter in Washington State decisional law.

Raven v. DSHS, 177 Wn.2d 804, 306 P.3d 920 (2013). In Raven, Ms. Raven (a certified professional guardian) was a court-appointed limited guardian of Ida, an 83-year-old woman who had been adjudicated incapacitated. The question arose for Ms. Raven whether to keep Ida in her own home – or place Ida in a nursing home or other long-term care

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<sup>18</sup> See pp. 5-6 of Exhibit 3 hereto. [CP 236-41]

facility. “Based on her review of Ida’s history and conversations with Ida’s family, Ms. Raven determined that Ida, when competent, consistently refused to be placed in a nursing home or other long-term care facility. Accordingly, [Ms.] Raven consented to a plan of care on Ida’s behalf that kept Ida in her home.” *Id.* at 811. DSHS later made a substantiated finding of neglect against Ms. Ravens for allowing Ida to stay in her home, instead of being placed in a nursing home or other long-term care facility. The DSHS Appeals Board affirmed that substantiated finding of neglect. The Supreme Court of Washington reversed, holding as follows (with emphasis added), *id.* at 817-18:

A guardian’s good-faith decision not to place an incapacitated person in a nursing home against the incapacitated person’s wishes cannot be the basis for a finding of neglect.

One of the difficulties of this case from the perspective of Ida’s care team is that Ida often required more care than could be delivered in a home setting. But in matters of consent, **although a ward may choose a course of action that would strike many as unreasonable, if the guardian can determine that the ward would choose such an action if competent, the guardian is bound to advocate for that position.** After investigating the issue of Ida’s residential placement preferences, [Ms.] Raven determined that when competent, Ida consistently refused to be placed in a nursing home or other long-term care facility. . . . DSHS found that [Ms.] Raven’s determination that Ida would not choose out-of-home care was made in good faith. . . .

Thus, guardians must implement substituted judgment in making decisions for their wards, even where objective observers might find the decision to be an unreasonable one.

Detention of Schuoler, 106 Wn.2d 500, 723 P.2d 1103 (1986). In Schuoler, Loretta was an adult woman who was admitted to a Yakima hospital when she “was disoriented and refused to take the medication that had been prescribed for her during an earlier admission.” *Id.* at 502. As a subsequent involuntary commitment hearing, Loretta’s treating psychiatrist asked the court to authorize electroconvulsive therapy (“ECT”) for her. The Supreme Court of Washington held that ECT could not be imposed upon Loretta against her wishes, as follows (with emphases added in bold and underline), *id.* at 507-08:

**A court asked to order ECT for a nonconsenting patient must therefore consider the patient’s desires before entering the order. The court should consider previous and current statements of the patient, religious and moral values of the patient regarding medical treatment and [ECT], and views of individuals that might influence the patient’s decision.** If the patient appears unable to

understand fully the nature of the ECT hearing – as severely mentally ill patients often are – **the court should make a “substituted judgment” for the patient that is analogous to the medical treatment decision made for an incompetent person.** [Citation omitted.] Finally, **the court should enter a finding on the nature of the patient’s desires.**

In this case, both doctors testified that discussing ECT with [Loretta] was futile. **The court thus should have made a “substituted judgment” for [Loretta].** However, the court made no attempt to inquire into the views of individuals close to the patient. . . . **We conclude that the court failed to conduct the investigation necessary to make a “substituted judgment” for [Loretta].**

Thus, not only guardians are bound by the doctrine of substituted judgment, but the courts also are.

Guardianship of Ingram, 102 Wn.2d 827, 689 P.2d 1363 (1984). In Ingram, Opal, a 66-year-old woman who was unable to care for herself and suffered from numerous physical ailments, had been determined incompetent. Mentally, she suffered from delusions as to the cause of her ailments, “but is alert, has fluent speech, and for the most part is goal oriented.” Id. at 829. Opal was admitted to a Yakima hospital, where she was diagnosed with, among other ailments, a 90% likelihood of cancer of the vocal cords involving both sides. In order to determine the extent of the cancer, Opal’s throat specialist would need to perform a biopsy of her vocal cords or a laryngoscopy.

Opal’s son petitioned for a guardianship over Opal, and a GAL was appointed for her. Opal’s throat specialist testified that, with no treatment, Opal’s tumor would expand, eventually close off her larynx, and result in strangulation. Her life expectancy would be anywhere from 6 to 18 months. The two treatment options were radiation treatment or surgical removal of Opal’s vocal cords; chemotherapy is not effective. In the throat specialist’s opinion, surgery would give Opal a 70-80% chance of survival, whereas radiation therapy would give only 40%. If radiation therapy fails, a laryngectomy still could be performed, but with a greater risk of complications; her chance of survival would be about 50%. Finally, even if the chosen treatment would cure the cancer, Opal’s life expectancy would probably be less than 5 years, due to her lung disease.

In her report, the GAL stated that Opal on several occasions had expressed great concern or fear over losing her voice (as a consequence of surgical removal of her vocal cords). The GAL had spoken to as many of Opal’s family members as she could, who reported that Opal had been delusional and paranoid since at least her early 20’s. She had led a life fairly independent of her family. Her son Breece, the guardianship

petitioner, had difficulty discussing any subject with her for more than 5 minutes. Opal usually ended conversations by laughing. Never having had a serious conversation with Opal regarding death, religion, or medical problems, Breece felt unable to make a substituted judgment. The Supreme Court of Washington reversed the trial court order compelling Opal's vocal cords to be surgically removed, as follows (with emphases added with bold and underline):

.... This case is further complicated by the fact that although [Opal] is legally incompetent, she has repeatedly expressed opposition to the surgery. .... [Id. at 836.]

**A judicial finding of incompetency does not deprive the ward of this right to choose or refuse treatment.** [Citation omitted.] **The finding of incompetency merely means that the ward's rights will be exercised by the guardian on the ward's behalf.** .... [Id.]

**All courts seem to agree that the goal is to do what the ward would do, if she were competent to make the decision.** .... A person's right of self-determination includes the right to choose between alternate treatments as well as the right to refuse life sustaining treatment; **the guardian's duty is to exercise this right on the ward's behalf, by doing whatever the ward would do if competent.** .... [Id. at 838-39.]

In determining what the ward would do, if competent, **the court makes a "substituted judgment" for the ward.** The goal is not to do what most people would do, or what the court believes is the wise thing to do, but rather what this particular individual would do if she were competent and understood all the circumstances ... . . . . [Id. at 839.]

.... It presents a choice between two treatments, one carrying a greater curative potential, but the other offering less severe side effects. A person's right to self-determination includes the power to choose between these two treatments. **[Opal] does not lose this right of self-determination merely by virtue of her incompetence.** [Citation omitted.] Thus, if the substituted judgment is that [Opal] would choose radiation treatment, this choice outweighs the State's interest in preserving life. .... [Id. at 843.]

Thus, both a lay guardian and a trial court are required to implement substituted judgment in making decisions for a ward, even where their own opinion might be that the ward's decision is unwise or is not what most people would choose to do.

### C. The Washington State Lay Guardian Training Program's

## **Recognition Of The Doctrine Of Substituted Judgment**

On December 7, 2014, Mr. Bolliger emailed the Washington State Lay Guardian Training Program, inquiring whether its training materials address the subject of substituted judgment. The following day, Kim Rood, of the Office of Guardianship and Elder Services, emailed Mr. Bolliger in response, attaching two Power Point slides.<sup>19</sup> The first Power Point slide used in the lay guardian training states as follows (with original emphasis):

**Substituted Judgment.** This standard requires the guardian to make a decision that best reflects what the incapacitated person would have decided when he or she had capacity.

The second Power Point slide used in the lay guardian training states as follows (with emphasis added in underline):

### The Role of the Guardian

- A Guardian is Authorized to Make Decisions on Behalf of the Incapacitated Person.
- Decision-Making Standards:
  - a. Substituted Judgment.
  - b. Best Interest.

Then, that second Power Point slide explains what substituted judgment is as follows (with emphasis added in bold and underline):

In a guardianship, the court takes from the incapacitated person the right to make important life decisions regarding such things as medical care and place of residence. The right to make these decisions is given to the guardian. **When making a decision on behalf of an incapacitated person, a guardian is expected to follow certain decision-making standards. The primary standard for decision-making is the “substituted judgment” standard. Here, the guardian must make a decision that best reflects what the incapacitated person would have decided when he or she had capacity. This involves examining past statements or actions of the incapacitated person to determine his or her values and preferences.** However, it is not always possible to determine past preferences of the incapacitated person. This would be the case if the

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<sup>19</sup> Those material are attached hereto as **Exhibit 4**. [CP 242-45]

incapacitated person was incapacitated from birth.

Thus, the lay guardianship training, which is mandated for lay guardians under RCW chapter 11.88, specifically teaches the substituted judgment doctrine for lay guardians (like Mr. Lamberson) to follow.

#### **D. The Doctrine Of Substituted Judgment Finds Support In The Legislative Intent For RCW Chapter 11.88**

The legislative intent for RCW chapter 11.88 is found in RCW 11.88.005, titled "Legislative intent." Although the legislative intent does not expressly use the words "substituted judgment," the concept of substituted judgment certainly finds support in the following language of legislative intent (with emphasis added):

**It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person.** The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, **their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary** to adequately provide for their own health or safety, or to adequately manage their financial affairs.

#### **E. Common Legal Practices Also Support The Doctrine Of Substituted Judgment**

Although the phrase "substituted judgment" normally is not invoked in these scenarios, the concept of honoring a competent person's wishes, even after the person becomes incapacitated, commonly finds examples under the law, namely: last wills and testaments, health care directives, and "do not resuscitate" forms are given full effect, even after the competent principals who executed such documents later have become incapacitated.

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Based upon the foregoing, under the doctrine of substituted judgment, Mr. Cudmore's guardian (Mr. Lamberson) and the court are required to implement Mr. Cudmore's wishes with respect to whether he wanted or needed a VAPO order of protection against Gregg Belt. Stated another way, under the doctrine of substituted judgment, the court cannot disqualify Mr. Bolliger from continuing to represent Gregg Belt on appeal – by ruling that a conflict of interest now exists under RPC 1.7 and/or RPC 1.9 (merely because Mr. Cudmore's guardian, Mr. Lamberson,

theoretically and unilaterally might like to assert that such a conflict now exists) – if Mr. Cudmore’s **competent expression** for this case actually was that no VAPO order of protection should be entered to “protect” him from Gregg Belt.

**II. Mr. Cudmore’s Competent Expression For This Case Actually Was That No VAPO Order Of Protection Should Be Entered To “Protect” Him From Gregg Belt – And, So, No Conflict Of Interest Is Implicated, Under RPC 1.7 And/Or RPC 1.9, With Mr. Bolliger Continuing To Represent Gregg Belt On Appeal**

On July 18, 2013, Mr. Cudmore’s personal physician since 1999 (who was successfully treating him for Alzheimer’s) declared Mr. Cudmore to be **mentally competent**. A mere eight days later – on July 26, 2013 – Mr. Cudmore declared as follows in this case:

1. I am the above-named alleged vulnerable adult, I have personal knowledge of the facts set forth below, and, if called to testify about the same, I can and will competently do so.
2. As I understand it, at the hearing last week, the Court entered a 1-year order of protection to protect me against Gregg Belt. The only involvement Gregg Belt has had in my life is that, earlier this month, he gave me a ride to my attorney’s, Mr. Bolliger’s office on two occasions. **I like Gregg Belt. He is the son of my good friend, Dona Belt. I have known Dona for about 35 years. I don’t want or need an order of protection against Gregg Belt. I ask the Court to get rid of it.**
3. I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

Five months after that – on December 27, 2014 – the court judicially established Mr. Cudmore to be **incapacitated**.

At the December 5, 2014 hearing mentioned in the introductory paragraph above, the **only evidence** before the court – addressing Mr. Cudmore’s **competent expression** for this case with respect to having a VAPO entered to “protect” him from Gregg Belt – was his declaration just referred to, wherein, again, Mr. Cudmore declared that **“I don’t want or need an order of protection against Gregg Belt. I ask the Court to get rid of it.”** In support of his disqualification motion, Mr. Meehan provided the court **no contrary evidence**.

Applying the substituted judgment doctrine discussed above, then, Mr. Lamberson cannot now state **his own** opinion – to the effect that he

does want a VAPO order of protection against Gregg Belt<sup>20</sup> and that, therefore, a conflict of interest **would** now exist under RPC 1.7 and/or RPC 1.9 if Mr. Bolliger is allowed to continue to represent Gregg Belt on appeal. Rather, under the substituted judgment doctrine, both Mr. Lamberson and the court must now honor Mr. Cudmore's **competent expression** that no VAPO order of protection should be entered to "protect" him from Gregg Belt. With only that position remaining from Mr. Cudmore's earlier period of competency, no conflict of interest is implicated, under RPC 1.7 and/or RPC 1.9, with Mr. Bolliger continuing to represent Gregg Belt on appeal.

Mr. Cudmore was nearly 85½ years old on the day (**December 27, 2013**) when the trial court adjudicated him as mentally incapacitated in the Guardianship case. Up until that day (i.e., for that entire 85½ years), Mr. Cudmore was presumed to be **mentally competent**.<sup>21</sup> With respect to that entire 85½ years, in order to try to refute Mr. Bolliger's presentation of the dispositive legal doctrine of substituted judgment, Mr. Meehan provided the court **no evidence whatsoever** to the effect that Mr. Cudmore had expressed

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<sup>20</sup> Besides, such an assertion by Mr. Lamberson now would be ridiculous because, as discuss later in this memorandum, the VAPO order of protection that is at issue in this case already has expired by its own terms.

<sup>21</sup> See, e.g., Guardianship of Beecher, 130 Wn.App. 66, 121 P.3d 743 (2005). In Beecher, Loretta Beecher was the AIP. Her stepson (Mr. Thorpe) was the guardianship petitioner. Ms. Beecher (like Mr. Cudmore, here) hired an attorney to defend her against the guardianship action. During the case, Ms. Beecher's attorney "aggressively challenged the guardianship proceedings. He filed motions seeking, among other things, Schisel's removal as GAL, dismissal of the guardianship petition, non-disclosure of Beecher's medical reports, and revision and reconsideration of several of the commissioner's rulings. Ms. Beecher's attorney also challenged Thorp's standing and moved for summary judgment before the GAL filed her final report or finished her investigation." Id. at 69. Later during the case, Mr. Thorpe and the GAL (Ms. Schisel) brought a motion disputing Ms. Beecher's attorney's fees "as unreasonable and unnecessary." Id. The trial court held the attorney's fees "which totaled \$110,740, were 'unreasonable and inappropriate in light of this matter.' [It] ordered [the attorney] to repay Beecher \$47,500 of the \$86,500 she had already paid [the attorney], approving only \$39,000 of his fees." Id. at 70. The Beecher Court reversed, holding as follows:

... the court can review fee and costs only **after an adjudication of incapacity. Until then, an alleged incapacitated person retains the right everyone else has to hire and pay the attorneys of her choice.** [Id. at 68, original emphasis and emphasis added.]

... a court's statutory review of an AIP's attorney's fees must also be limited to situations **where there has been a determination that the AIP is in fact incapacitated. Until that time, she has the same autonomy and rights as any other person.** [Id. at 72, emphasis added in bold.]

that he wanted or needed a VAPO in place to protect him from Gregg Belt. The **only evidence** on that subject was Mr. Cudmore's own **July 26, 2013** declaration, in which he asserted as follows (with emphasis added):

**. . . . I like Gregg Belt. He is the son of my good friend, Dona Belt. I have known Dona for about 35 years. I don't want or need an order of protection against Gregg Belt. I ask the Court to get rid of it.**

Mr. Cudmore's declaration came just 8 days after his personal physician since 1999 (Dr. Vaughn, who was successfully treating Mr. Cudmore for Alzheimer's) declared Mr. Cudmore to be **mentally competent**.

Based upon the foregoing, Mr. Bolliger respectfully requests that this Court hold that legal doctrine of substituted judgment operates in this case to the effect that, in Mr. Cudmore's and Gregg Belt's united opposition to Mr. Meehan's frivolous VAPO case against Gregg Belt, no (RPC 1.7 or RPC 1.9) conflict of interest ever did exist between Mr. Cudmore and Gregg Belt – and that, therefore, the trial court erred by failing to deny Mr. Meehan's motion to disqualify Mr. Bolliger from representing Gregg Belt any further on appeal.<sup>22</sup>

**D. Mr. Bolliger Requests Recovery Of His Attorneys' Fees Pursuant To CR 11 And RAP 18.1**

With Mr. Bolliger's February 12, 2014 letter, Mr. Bolliger put Mr. Meehan on notice that Mr. Bolliger would be seeking CR 11 sanctions against Mr. Meehan. That letter constitutes proper informal notice of the same pursuant to Biggs v. Vail, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). The above facts, points, and authorities demonstrate that Mr. Meehan's

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<sup>22</sup> In its disqualification order, the trial court failed to make any findings or conclusions with respect to the dispositive legal doctrine of substituted judgment.

disqualification motion (and its related filings) have been violative of CR 11, because they obviously were (1) not well grounded in fact, (2) not warranted by existing law, and (3) not reasonably researched by Mr. Meehan prior to his filing them. CR 11. Further, Mr. Meehan's frivolous disqualification motion came on the heels of him pursuing his underlying frivolous VAPO case against Gregg Belt, itself merely as a dishonest ruse to keep Gregg Belt from testifying about Mr. Cudmore's **mental competence** in the related Guardianship case.

Moreover, from the very inception of his pursuit of his frivolous VAPO case against Gregg Belt, Mr. Meehan was engaging in a **clear and concurrent conflict of interest**: Mr. Meehan was purporting to represent the legal interests **OF** Mr. Cudmore (here, in Mr. Meehan's VAPO case against Gregg Belt) while, at the same time, he was representing Mr. Lamberson **AGAINST** Mr. Cudmore (in Mr. Lamberson's guardianship case against Mr. Cudmore). That is not allowed under RPC 1.7(a).

This Court may impose on Mr. Meehan a sanction for "the amount of the reasonable expenses incurred because of the filing . . . , including a reasonable attorney fee." CR 11(a). See, also, Biggs v. Vail, supra.

Based upon the foregoing, and pursuant to RAP 18.1, Mr. Bolliger respectfully requests that this Court impose CR 11 sanctions against Mr. Meehan for filing and pursuing his frivolous disqualification motion against Mr. Bolliger.

#### IV. CONCLUSION

*First*, procedurally, the trial court should have followed the well-settled

decisional law and denied Mr. Meehan's disqualification motion on grounds of Mr. Meehan's extreme delay in filing it. *Second*, on the merits, the court should have denied Mr. Meehan's disqualification motion because – given the express wording of RPC 1.7 and RPC 1.9, combined with the unique facts of this case – Mr. Bolliger clearly would not be violating either rule if the court had allowed Mr. Bolliger to represent Gregg Belt further on appeal. *Third*, also on the merits, while he still was **mentally competent**, Mr. Cudmore's declared personal opinion was that **"I like Gregg Belt. . . . I don't want or need an order of protection against Gregg Belt. I ask the Court to get rid of it."** Mr. Cudmore and Gregg Belt always were perfectly aligned with each other below. From the inception of this case, there never was any hint of a potential conflict between Mr. Cudmore and Gregg Belt – and, throughout this case, no conflict ever arose between Mr. Cudmore and Gregg Belt. **There is no evidence in the record to the contrary.** The trial court should have followed the well-settled legal doctrine of substituted judgment and denied Mr. Meehan's disqualification motion on grounds that Mr. Meehan's subsequent adjudication of incapacity cannot itself cause a conflict of interest to instantly and automatically spring up between Mr. Cudmore and anybody, including Gregg Belt. In properly applying the dispositive legal doctrine of substituted judgment, then, the court should have ruled that Mr. Bolliger clearly would not be violating either rule if the court had allowed Mr. Bolliger to represent Gregg Belt further on appeal.<sup>23</sup>

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<sup>23</sup> Again, with respect to both of the issues of waiver-based-upon-delay and the legal doctrine of substituted judgment, in its disqualification order, the court failed to make any findings or conclusions whatsoever.

Based upon the foregoing, Mr. Bolliger respectfully prays for the following holdings from this Court:

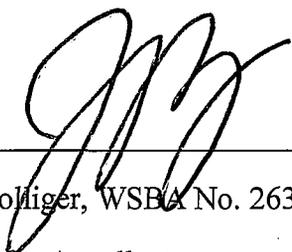
- the superior court erred by failing to deny Mr. Meehan's motion to disqualify Mr. Bolliger from representing Gregg Belt any further on appeal because of Mr. Meehan's extreme delay in filing his motion,
- given the express wording of RPC 1.7 and RPC 1.9, combined with the unique facts of this case – the superior court erred by failing to deny Mr. Meehan's motion to disqualify Mr. Bolliger from representing Gregg Belt any further on appeal because no RPC 1.7 or RPC 1.9 conflict of interest ever existed between Mr. Cudmore and Gregg Belt in this case,
- the superior court erred by failing to apply the dispositive legal doctrine of substituted judgment,
- proper judicial application of the dispositive legal doctrine of substituted judgment in this case compels a conclusion that no RPC 1.7 or RPC 1.9 conflict of interest ever existed between Mr. Cudmore and Gregg Belt – because Mr. Cudmore's only **mentally competent** expression on the subject was that he clearly did not want a VAPO getting entered on his behalf against Gregg Belt,
- there is nothing about Mr. Bolliger's joint representation of Mr. Cudmore and Gregg Belt in this case which should subject Mr. Bolliger to disciplinary proceedings with the state bar pursuant to either RPC 1.7 or RPC 1.9,
- Mr. Meehan himself violated RPC 1.7 by engaging in an actual concurrent conflict of interest: Mr. Meehan was purporting to represent the legal interests of Mr. Cudmore (here, in Mr. Meehan's VAPO case against Gregg Belt) while, at the same time, he was representing Mr. Lamberson **against** Mr. Cudmore (in Mr. Lamberson's guardianship case against Mr. Cudmore),
- (1) Mr. Meehan did not have sufficient factual and legal bases to prosecute his underlying VAPO case against Gregg Belt and (2) Mr. Meehan frivolously refused to stipulate to vacate the VAPO in the August 12-20, 2013 time frame (i.e., 20+ months earlier than he finally agreed to do so: on April 28, 2015) – and those actions by Mr. Meehan therefore amount to his frivolous prosecution of a VAPO petition under CR 11,
- Mr. Meehan did not have sufficient factual and legal bases to file and pursue his motion to disqualify Mr. Bolliger from representing Gregg Belt any further on appeal – and his doing so therefore amounts to his frivolous filing and pursuit of a disqualification motion under CR 11,

- an order imposing CR 11 attorneys' fees against Mr. Meehan and in favor of Mr. Bolliger, in both the trial court and appellate proceedings, dating at least from Mr. Bolliger's February 12, 2014 letter putting Mr. Meehan on notice that Mr. Bolliger would be seeking CR 11 fees against Mr. Meehan in this case, and
- an order directing Mr. Meehan to disgorge back to Mr. Cudmore's Estate all fees he has been paid therefrom, in connection with this case to date, pursuant to CR 11.

DATED this 30 day of August, 2015.

**BOLLIGER LAW OFFICES**

By:

  
\_\_\_\_\_  
John C. Bolliger, WSBA No. 26378

Attorneys for Appellant

**DECLARATION**

I, John C. Bolliger, declare as follows:

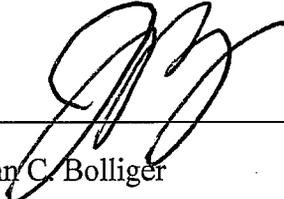
1. I am the above-named appellant, I have personal knowledge of the facts set forth above, and, if called to testify about the same, I can and will competently do so.

2. I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 30 day of August, 2015.

Kennewick, WA

City, state where signed

  
\_\_\_\_\_  
John C. Bolliger

DECLARATION OF SERVICE

STATE OF WASHINGTON )  
COUNTY OF BENTON ) ss.

I, John C. Bolliger, declare as follows:

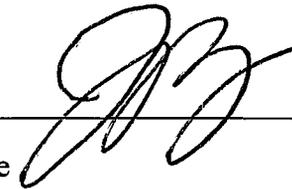
On the date set forth below, I caused a true and correct copy of this document to be sent to the following persons and entities in the manner shown:

<u>Shea C. Meehan</u>	<input type="checkbox"/>	regular mail
	<input type="checkbox"/>	e-mail no.
1333 Col. Park Trail, Ste. 220	<input type="checkbox"/>	facsimile no.
Richland, WA 99352	<input checked="" type="checkbox"/>	Pronto Process & Messenger Service, Inc.
	<input type="checkbox"/>	hand-delivery by John C. Bolliger
	<input type="checkbox"/>	Federal Express _____

I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 30 day of August, 2015.

Kennewick, WA  
City, state where signed

Signature 

# Appendix



RECEIVED MAY 05 2014

# WSBA

OFFICE OF DISCIPLINARY COUNSEL

## Acknowledgment That We Have Received A Grievance

Date: May 2, 2014 ODC File: 14-00734

### To the Grievant:

We received your grievance against a lawyer and opened a file with the file number indicated above. We are requesting a written response from the lawyer. You generally have a right to receive a copy of any response submitted by the lawyer. After we review the lawyer's response, if it appears that the conduct you describe is not within our jurisdiction, does not violate the Supreme Court's Rules of Professional Conduct (RPC), or does not warrant further investigation, we will write you a letter to tell you that. If we begin an investigation of your grievance, we will give you our investigator's name and telephone number. If, as a result of an investigation and formal proceeding, the lawyer is found to have violated the RPC, either the Disciplinary Board or the Supreme Court may sanction the lawyer. Our authority and resources are limited. We are not a substitute for protecting your legal rights. We do not and cannot represent you in legal proceedings. If you believe criminal laws have been broken, you should contact your local police department or prosecuting attorney. There are time deadlines for both civil and criminal proceedings, so you should not wait to take other action.

Grievances filed with our office are not public information when filed, but **all information related to your grievance may become public**. Our office handles a large number of files. We urge you to communicate with us only in writing, including any objection you have to information related to your grievance becoming public, until we complete our initial review of your grievance. You should hear from us again within four weeks.

## Request for Lawyer Response

### To the Lawyer:

The grievance process is governed by the Rules for Enforcement of Lawyer Conduct (ELC). Although we have reached no conclusions on the merits of this grievance, we are requesting your preliminary written response. If you do not respond to this request within **thirty (30) days** from the date of this letter, we will take additional action under ELC 5.3(h) to compel your response. You must personally assure that all records, files, and accounts related to the grievance are retained until you receive written authorization from us, or until this matter is concluded and all possible appeal periods have expired.

Absent special circumstances, and unless you provide us with reasons to do otherwise, **we will forward a copy of your entire response to the grievant**. If the grievant is not your client, or you are providing personal information, please clearly identify any information to be withheld and we will forward a copy of your redacted response to the grievant, informing the grievant that he or she is receiving a redacted copy. Decisions to withhold information may be considered by a review committee of the Disciplinary Board. If you believe further action should be deferred because of pending litigation, please explain the basis for your request under ELC 5.3(d).

Sincerely,

  
Felice P. Congalton  
Associate Director

Original: Grievant: Shea C. Meehan  
cc: Lawyer: John C. Bolliger (with copy of grievance, disk not included)



WALKER  
 HEYE  
 MEEHAN  
 EISINGER PLC

Shea C. Meehan  
 Attorney in Washington & Idaho  
 smeehan@walkerheyeye.com

Natalie A. DeLaRosa  
 Paralegal  
 ndelarosa@walkerheyeye.com

April 24, 2014

RECEIVED

APR 28 2014

WSBA OFFICE OF  
 DISCIPLINARY COUNSEL

Office of Disciplinary Counsel  
 Washington State Bar Association  
 1325 Fourth Avenue, Suite 600  
 Seattle, WA 98101-2539

Re: Grievance against Attorney John Bolliger, WSBA #26378

Dear Sir or Ma'am:

Attached hereto is a grievance against a lawyer form that I have prepared in regard to attorney John Bolliger. Also enclosed with this letter is a CD with the pleadings I possess in each of these cases referenced below.

Mr. Bolliger's actions in the matters below have resulted in CR11 sanctions in the amount of \$9,782.75, the entry of a vulnerable adult protection order against Mr. Bolliger and an award of fees related to the protection order in the amount of \$2,714.64. Additionally, Mr. Bolliger's actions have resulted in substantial expense to Mr. Cudmore and have damaged the reputation of attorneys in the state.

The items that follow relate to four different cases that Mr. Bolliger has participated in. In three of the cases, I was also involved. One of the cases is a matter in which I have not been involved but, due to my concern for the public generally, I believe it is incumbent upon me to bring the matter to your attention.

In order to get a general impression of Mr. Bolliger's unethical conduct, I strongly recommend that you review the declaration of Shea C. Meehan in support of vulnerable adult protection order. For your convenience, I have attached a copy as Exhibit B. The document is also included in the pleading I am forwarding with this letter in electronic form. What follows are specific concerns that I have in regard to the matters.

In re: Guardianship of Cudmore – Benton County Cause No. 13-4-00260-9

- Mr. Bolliger purported to represent Mr. Cudmore – the alleged incapacitated person – and three additional witnesses in the case. The witnesses represented were Donna Belt, Larry Belt and Gregg Belt. Mr. Bolliger undertook this concurrent representation without obtaining a waiver. Mr. Bolliger was also identified as a witness in the case. This would appear to a violation of RPC 1.7

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and potentially RPC 1.9.

- After the court entered an order denying Mr. Bolliger's motion to be appointed as counsel for Mr. Cudmore, Mr. Bolliger continued to act as if he represented Mr. Cudmore and continued to have contact regarding the subject matter of representation without permission from Mr. Cudmore's attorney Rachel Woodard. This would appear to be a violation of RPC 4.2.
- Mr. Bolliger continued to act as if he was an attorney for Mr. Cudmore in this matter even after the court had specifically denied his request to be appointed as well as his motion for reconsideration of the order denying his appointment. This would appear to violate RPC 8.4(d) and (j).
- Mr. Bolliger issued subpoenas to financial institution in a case in which he was neither a party nor counsel of record of a party. This is in direct violation of the civil rules. The subpoenas were quashed by the court. But, not until substantial effort was spent to deal with the wrongfully issued subpoenas.
- Mr. Bolliger refused to comply with a court order for production of his file.
- Mr. Bolliger didn't keep records of his fees or time spent with Mr. Cudmore. Mr. Bolliger nonetheless sought payment of \$20,000 in fees from Mr. Cudmore's estate. See correspondence attached as Exhibit C.
- Mr. Bolliger had himself appointed as a presently active attorney in fact for Mr. Cudmore when, pursuant to the testimony offered by Larry Belt and Donna Belt during their depositions, Mr. Cudmore only wanted Mr. Bolliger to have power over his finances in the event he were found to be incapacitated.
- Mr. Bolliger violated RPC 3.1 by bringing various frivolous motions and filing various frivolous pleadings.
- Mr. Bolliger violated RPC 3.7 by continuing to advocate in a case in which he was identified as a bona-fide witness.
- Mr. Bolliger initiated inappropriate ex parte contact with the court. (See declaration of Shea C. Meehan, Exhibit N, attached.)

Bolliger VAPO – Benton County Cause No. 13-2-02321-8

- In this matter, Mr. Bolliger was found to have imposed mental anguish, exploitation, or financial exploitation upon Mr. Cudmore. These actions are violations of RPC 8.4 (d).

Gregg Belt VAPO – Benton County Cause No. 13-2-01697-1

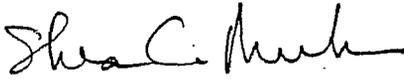
- Mr. Bolliger purported to represent both the vulnerable adult and the respondent in this action. He did so without obtaining a waiver. Such conduct is a likely violation of RPC's 1.7 and 1.9.
- Mr. Bolliger withdrew from representation of Mr. Cudmore in the matter, but has continued to act on behalf of Mr. Belt. Again, this has been done without obtaining any waiver of a conflict.

Montecito Estates, LLC, et al – Benton County Cause No. 13-2-02196-7

- The complaint in this matter is attached as Exhibit D. The complaint indicates that Mr. Bolliger's client is suing him for malpractice. It should be noted that the complaint against Mr. Bolliger was drafted on Mr. Bolliger's own pleading paper for his client. Additionally, when his client signed the complaint in her "pro se" capacity, it appears she forgot to fill in the date and place of signing. The handwriting that appeared on that part of the verified complaint is, in fact, Mr. Bolliger's own handwriting. It is difficult to see how drafting a complaint against oneself for a client does not pose an unwaivable conflict of interest.

I encourage you to contact Attorney Rachel Woodard, Guardian ad Litem Wayne May and Judges Spanner and Mendoza. Each of these individuals have additional knowledge of the facts in this matter and can corroborate the allegations I have made. Should you like to discuss this matter with me or should you like further documentation from my file, do not hesitate to contact me.

Very truly yours,



SHEA C. MEEHAN

SCM/jjb  
Enclosures  
4000:43

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# GRIEVANCE AGAINST A LAWYER



Office of Disciplinary Counsel  
Washington State Bar Association  
1325 Fourth Avenue, Suite 600  
Seattle, WA 98101-2539

## GENERAL INSTRUCTIONS

- Read our information sheet *Lawyer Discipline in Washington* before you complete this form, particularly the section about consenting to disclosure of your grievance to the lawyer.
- If you have a disability or need assistance with filing a grievance, call us at (206) 727-8207. We will take reasonable steps to accommodate you.
- If you prefer to file online, visit <http://www.wsba.org/public/complaints/>.

### INFORMATION ABOUT YOU

Meehan, Shea C.  
Last Name, First Name, Middle Initial  
1333 Columbia Park Trail, #220  
Address  
Richland, WA 99352  
City, State, and Zip Code  
(509) 735-4444  
Phone Number  
NA  
Alternate Address, City, State, and Zip Code  
NA  
Alternate Phone Number  
smeehan@walkerheye.com  
Email Address

### INFORMATION ABOUT THE LAWYER

Bolliger, John  
Last Name, First Name  
5205 W. Clearwater Avenue  
Address  
Kennewick, WA 99336  
City, State, and Zip Code  
(509) 734-8500  
Phone Number  
26378  
Bar Number (if known)

### INFORMATION ABOUT YOUR GRIEVANCE

Describe your relationship to the lawyer who is the subject of your grievance:

I am a client  
I am a former client  
I am an opposing party

I am an opposing lawyer  
Other: \_\_\_\_\_

Is there a court case related to your grievance?  YES  NO

If yes, what is the case name and file number?

See attached

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Explain your grievance in your own words. Give all important dates, times, places, and court file numbers. Attach additional pages, if necessary. Attach copies (not your originals) of any relevant documents.

In re: James D. Cudmore - Benton County Cause No. 13-4-00260-9

In re: Cudmore v. Belt - Benton County Cause No. 13-2-01697-1

In re: Cudmore v. Bolliger - Benton County Cause No. 13-2-02321-8

In re: Montecito Estates, LLC, et al v. Bolliger Law et al  
Benton County Cause No. 13-2-02196-7

AFFIRMATION

I affirm that the information I am providing is true and accurate to the best of my knowledge. I have read *Lawyer Discipline in Washington* and I understand that all information that I submit can be disclosed to the lawyer.

Signature: *Shel C. Mink* Date: 4/23/14

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RECEIVED FEB 04 2015

# WSBA

OFFICE OF DISCIPLINARY COUNSEL

Erica Temple  
Disciplinary Counsel

direct line: (206) 727-8328  
fax: (206) 727-8325  
email: ericat@wsba.org

February 2, 2015

Shea Cornelison Meehan  
1333 Columbia Park Trl Ste 220  
Richland, WA 99352-4713

John Cameron Bolliger  
Clearwater Law Group  
5205 W Clearwater Ave  
Kennewick, WA 99336-1930

Re: Grievance of Shea Cornelison Meehan against John Cameron Bolliger  
ODC File No. 14-00734

Dear Mr. Meehan and Mr. Bolliger

On April 28, 2014, Shea Meehan filed this grievance against John Bolliger alleging various acts of misconduct by Mr. Bolliger during the litigation in Benton County Superior Court No 13-4-00260-9, 13-2-0231-8, and 13-2-01697-1.

Under Rule 5.3(d)(1) of the Rules for Enforcement of Lawyer Conduct (ELC), disciplinary counsel may defer an investigation "if it appears that the allegations are related to pending civil or criminal litigation;" "if it appears that the respondent lawyer is physically or mentally unable to respond to the investigation;" "if a hearing has been ordered under Rule 8.2(a) or supplemental proceedings have been ordered under rule 8.3(a);" or "for other good cause, if it appears that the deferral will not endanger the public." We believe the best course of action at this time is to defer the investigation of this matter because the allegations in Mr. Meehan's grievance are related to the pending civil litigation.

If you deliver or mail to us a written request for review of this decision to defer within **forty-five (45)** days after the mailing of this letter, this matter will be referred to a Review Committee of the Disciplinary Board under ELC 5.3(d) with our recommendation that deferral is appropriate.

Please inform us when the litigation (and any related appellate action) is concluded and we will

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Mr. Bolliger and Mr. Meehan

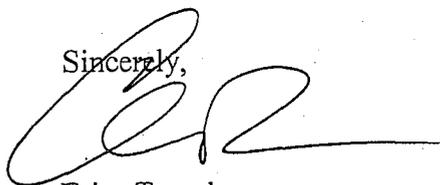
February 2, 2015

Page 2 of 2

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re-open our investigation of the grievance as appropriate. In addition, we request that you retain all records, files and accounts related to this grievance until this matter is concluded.

Sincerely,

A handwritten signature in black ink, appearing to be 'ET', written over the word 'Sincerely,'.

Erica Temple  
Disciplinary Counsel